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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFREDO CACHUA,

Defendant and Appellant.

B208795

(Los Angeles County
Super. Ct. No. KA080195)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Appellant, Alfredo Cachua, appeals from the judgment entered following a jury trial which resulted in his conviction of two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a))¹ during the commission of each of which he personally inflicted great bodily injury (§ 12022.7, subd. (a)). The trial court sentenced Cachua to six years in prison. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.

a. The prosecution's case.

At approximately 9:00 p.m. on December 22, 2006, Christopher Aparicio arrived at a party being held at a house at 2333 Second Street, across the street from his home in the City of La Verne. People attending the party had paid a cover charge to enter and had then congregated in the backyard where alcoholic beverages were being served.

At approximately 10:30 p.m., people were asked to leave the party. A number of party attendees were upset that they had paid a cover charge and were then “having to get kicked out right away.” As a result, an “incident” occurred. Aparicio walked around the side of the house, out to the sidewalk in front of the house, then heard “punches.” He turned around in time to see appellant throw a “punch” at him. Appellant’s punch grazed Aparicio, who punched appellant back. The two men ended up in a fight, rolling around on the grass. As appellant and Aparicio fought, Aparicio could hear “a lot of fighting” going on around them. Then appellant, who was holding a black object later determined to be a knife, stabbed Aparicio in the “back of [the] neck, [his] sides, [his] chest, [his] hand and [his] lower waist.” The blood from his wounds soaked Aparicio’s sweater, pants and socks.²

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

² Aparicio had to be air-lifted to the County U.S.C. Medical Center where he was treated for his wounds, which included stitches and the placement of a tube in one of his lungs.

Josh Luera arrived at the party in La Verne at approximately 10:00 p.m. He estimated that there were approximately 50 people between the ages of 15 and 25 attending the party in the back yard of a house on Second Street. When everyone was asked to leave the party, Luera and his friends walked out after appellant. When Luera reached the front yard, appellant and two of his friends were sitting on the front porch of the house. As Luera entered the front yard, a fight broke out between appellant and his group and others who had been attending the party. Appellant attacked Luera's friend, Aparicio and Luera saw the two men rolling around on the lawn. Luera tried to pull Aparicio away from appellant, but was unsuccessful. Others in the area started kicking at Aparicio and appellant as they fought. The fighting between appellant and Aparicio continued until the participants heard sirens coming toward the house. At that point appellant got up, saw Luera and attempted to punch him in the head. Luera blocked the hit with his left arm, but felt pain in the area of his lower rib cage. Although appellant had not hit Luera in the head, he had stabbed Luera in the side, fracturing one of his ribs and puncturing his spleen. Luera turned and ran from appellant back to where Aparicio was still lying on the ground. Luera picked up Aparicio and assisted him as they crossed the street. Aparicio believed that, since the only person he had fought with was appellant, it was appellant who had stabbed him.

La Verne Police Detective Mark Gutierrez arrived at the house on Second Street at approximately 10:30 p.m. Other police officers and paramedics were already at the scene. Gutierrez, however, assisted in the investigation of the stabbings and took appellant into custody. Gutierrez found appellant east of the Second Street house, on G Street. He was walking down the street with two other individuals, who were later determined to be his brothers. When questioned about the knife, appellant told Gutierrez it was “ ‘in front of the house where the party was at.’ ” After “secur[ing]” the three young men, Gutierrez returned to the site of the stabbings. He found a knife in the front yard of a house at 2312 Second Street, just southwest of the house where the party had been held.

b. *Defense evidence.*

Appellant's 15-year-old brother, Noel C., testified that he had gone to the party on Second Street with a friend, Thomas P., and his brother, Oscar C. The three boys met up with appellant at the party. After everyone had gone to the front of the house, Noel C. saw his two brothers "jumped by a group of men." Noel C. described the scene as "chaotic." He testified: "When the group came out, they said they were following us And one guy ran up, and he tried to punch my brother[,] Oscar[,] behind his head. My brother turned around, and it hit him in the face. And a group of men – as soon as that punch was thrown, a group of men started throwing bottles, and bottles started crashing everywhere. And I think like about 10 guys jumped on my brother Oscar, and my brother Alfredo [(appellant)] went in to defend him, and he started trying to fight the guys off. And the people seen that, and all the guys went towards him." Noel C. testified that he just watched because he did not know what else to do. Police officers arrived approximately 10 minutes after the fights broke out. Noel C. stated, "there [were] no sirens. The police just crept up . . . [a]fter everything was over." Noel C. never saw appellant with a knife.

Seventeen-year-old Thomas P. testified he went to the party with Noel C., Oscar C. and appellant. They arrived at the party at approximately 7:00 p.m. Most of the people there were between 17 and 20 years of age. When people were told to leave the party at approximately 8:30, they became angry and fights broke out in the front yard. Appellant jumped into a fight to protect his brother, Oscar C. Soon, there were two fights: one involving Oscar C. and one involving appellant. A group of approximately five men was on top of appellant. After he got "jumped," Thomas P. did not see appellant again.

c. *Rebuttal.*

La Verne Police Detective Cory Leeper participated in the investigation of the stabbings which occurred at the December 22, 2006 party. Leeper interviewed Noel C. at the police station. Noel C. told Leeper that he had gone to the party with his two brothers, but that he had spent the entire time he was there with some girls in the back

garage. When he heard that the police were coming, Noel left the party with his brothers. Noel told Leeper he “never saw any altercation of any kind.”

2. Procedural History.

Following a preliminary hearing, appellant was charged by information with two counts of assault with a deadly weapon (§ 245, subd. (a)(1)), during each of which he personally inflicted great bodily injury (§ 12022.7, subd. (a)). Count one alleged appellant had assaulted Luera and count two alleged he had assaulted Aparicio.

On November 2, 2007, appellant moved to have count two of the information set aside (§ 995) on the ground that he had been committed without reasonable or probable cause. After considering the testimony given at the preliminary hearing, the trial court denied the motion on January 22, 2008.

At trial, defense counsel requested that the jury be instructed on self-defense. The trial court determined that, should the jury believe appellant’s witnesses, that appellant entered the fray to protect his brother and was then required to protect himself, self-defense and defense of others instructions were appropriate. The trial court noted: “This was a melee. And[,] again, if the defense version is believed, there’s anywhere from five to ten people assaulting the defendant at a particular point in time.”

After the trial court instructed the jury and counsel argued, the jury deliberated for several hours before finding appellant guilty of both counts of assault with a deadly weapon. The jury also found true the allegations that, during each of the assaults, appellant inflicted great bodily injury.

At proceedings held on April 25, 2008, counsel for appellant made a motion for a new trial. Counsel argued that the verdict was “contrary to the evidence” in that identification of appellant as the assailant of each of the victims was uncertain. The trial court denied the motion indicating that “[t]here was no other evidence that any other person was armed with a knife or had a knife or any other persons received knife injuries other than these two victims who happened to have received [them] during the altercation with [appellant]”

The trial court sentenced appellant to the mid-term of three years in prison for his conviction of assault with a deadly weapon of Luera. For his infliction of great bodily injury on Luera, the trial court imposed the mid-term of three years, for a total of six years in prison as to count one. As to count two, the assault with a deadly weapon of Aparicio, the trial court imposed the mid-term of three years for the assault and the mid-term of three years for the infliction of great bodily injury, the terms to run concurrently with those imposed for count one. The trial court awarded appellant 226 days of presentence custody credit for time actually served and 34 days of good time/work time. He was ordered to pay a \$20 court security fee (§ 1465.8, subd. (a)(1)), a \$400 restitution fine (§ 1202.4, subd. (b)) and a stayed \$400 parole revocation restitution fine (§ 1202.45).

Appellant filed a timely notice of appeal on June 13, 2008.

This court appointed counsel to represent appellant on appeal on September 4, 2008.

CONTENTIONS

After examining the record, counsel for appellant filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice dated November 5, 2008, the clerk of this court advised appellant to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. After obtaining a 30-day extension, on January 2, 2009 appellant filed a brief arguing: (1) the victims of the crimes changed their stories for trial in that prior to trial they had indicated they would be unable to identify the individual who had attacked them with a knife; (2) that he had not been given sufficient time to consider whether to take advantage of the plea bargain being offered by the prosecutor or to proceed to trial; and (3) that his trial counsel had been ineffective for failing to call as a witness the owner of the house where the party occurred as the owner's testimony would have contradicted that of the prosecution's witnesses.

As to appellant's first argument, Luera's testimony at trial was consistent with that given at the preliminary hearing and, prior to trial, Aparicio viewed a photographic line-up and identified appellant as his attacker. Although during a pre-trial interview with a

police officer while he was in the hospital recovering from his wounds Aparicio indicated that appellant might not have been the individual who stabbed him, Aparicio later concluded that, since the only person he had fought with was appellant, it was appellant who had inflicted his wounds. Under these circumstances, the jury, after hearing all the evidence, could properly find beyond a reasonable doubt that appellant stabbed Aparicio. (*People v. Lindsay* (1964) 227 Cal.App.2d 482, 493-494 [“The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, the uncertainty of recollection, and the qualification of identity and lack of positiveness in testimony are matters which go to the weight of the evidence and the credibility of the witnesses, and are for the observation and consideration, and directed solely to the attention of the jury”]; see *People v. Austin* (1961) 198 Cal.App.2d 669, 672 [“The identity of the accused as the perpetrator of a crime is a question of fact to be resolved by the trial court”].)

As to appellant’s assertion he was not given enough time to decide whether to take the prosecutor’s offer of a plea bargain or to go to trial, the record reveals otherwise. When the trial court gave appellant the choice of entering a plea or having his case tried by a jury, appellant’s response was clear. He stated, “I’m willing – I’m going to trial, sir.”

Finally, a review of the record fails to indicate appellant’s trial counsel was ineffective. “To prevail on a claim of ineffective assistance of counsel, the defendant must show counsel’s performance fell below a standard of reasonable competence, and that prejudice resulted. [Citations.]” (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) Appellant has provided no concrete evidence that, had counsel called the owner of the house where the party was given, his or her testimony would have exonerated him. Appellant’s own, uncorroborated statement is not sufficient to warrant relief. (*In re Alvernaz* (1992) 2 Cal.4th 924, 938, 945.)

REVIEW ON APPEAL

We have examined the entire record and are satisfied appellant's counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.